No. 82-1523

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN RE: JOHNS-MANVILLE ASBESTOS CASES
APPEAL OF: DR. SAMUEL S. KELLER

DR. SAMUEL S. KELLER,

Petitioner,

vs.

JOHN M. McDANIEL, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the denial of a permanent injunction to prohibit the oral deposition of a non-party, when the deposition could cause irreparable physical and mental injury to that non-party, is an appealable order?

LIST OF PARTIES

Petitioner

DR. SAMUEL S. KELLER

Respondents

JOHN M. MCDANIEL
LEONARD SCOTT
VIRGIL AKER
ELMER BARTON
MARTIN BRIDGES
WALTER GEORGE
ROY GRISSOM
MERRILL KING
WARNER HAWTHORNE
MAMARTH KLIORA
OLEN SCOTT
JAMES STEDHAM

Defendants

JOHNS-MANVILLE CORPORATION
JOHNS-MANVILLE SALES CORPORATION
CANADIAN JOHNS-MANVILLE COMPANY, LTD.
CANADIAN JOHNS-MANVILLE ASBESTOS, LTD.
BELL ASBESTOS
FLINTKOTE CORPORATION
ASBESTOS CORPORATION
HOOKER CHEMICAL COMPANY
FIBREBOARD CORPORATION
COMBUSTION ENGINEERING
NORTH AMERICAN ASBESTOS
CALAVEROS ASBESTOS
BRINTO MINING LTD.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Dr. Samuel S. Keller, a non-party in *In Re: Johns-Manville Asbestos Cases*, 77 C 3534 (N.D. Ill.), prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on December 9, 1982.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is printed in Appendix A, *infra*, pp. 1a-2a. The District Court Order is printed in Appendix A, *infra*, p. 3a.

JURISDICTION

The opinion of the Court of Appeals was entered on December 9, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1976).

STATUTES INVOLVED

The statutory provisions involved are Sections 1291 and 1292(a)(1) of the Federal Rules of Civil Procedure, 28 U.S.C. §§1291, 1292(a)(1) (1976). Section 1291 provides, in relevant part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States.

Section 1292(a)(1) provides, in relevant part:

> (a) The courts of appeals shall have jurisdiction of appeals from:
> (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . .

STATEMENT

Petitioner, Dr. Samuel S. Keller, is not a party to the underlying litigation brought in the United States District Court for the Northern District of Illinois by certain present or former employees of the Johns-Manville Corporation's Waukegan, Illinois plant against Johns-Manville and others.[1] Dr. Keller was an independent contracting doctor at the Johns-Manville Waukegan plant from 1923 until early 1954. Dr. Keller assisted in the treatment of work related physical injuries, undertook pre-employment physical examinations and performed, or caused to be performed, some chest x-rays of then current or prospective employees.

Dr. Keller is now over ninety-one (91) years old, having left Johns-Manville almost thirty years ago. He was noticed for deposition in the underlying litigation in 1982. While Dr. Keller was preparing for his deposition, it became increasingly apparent that the mere anticipation of an oral deposition was exposing him to serious and substantial health risks. Accordingly, Dr. Keller's personal physician, Dr. William R. Darnall, was asked to provide his medical opinion concerning the advisability of proceeding with that deposition. Dr. Darnall expressed in a sworn affidavit his medical opinion that Dr. Keller should not be deposed, because of his age and physical and mental conditions. Dr. Keller had suffered a serious stroke in 1981 and was suffering from defects in memory and judgment, hardening of the arteries, and atrophy of

[1] This was one of numerous suits brought nationwide commonly referred to as the "asbestos litigation".

the brain. The physical and emotional stress that any deposition would place on him would, in Dr. Darnall's opinion, seriously threaten his health. Accordingly, a permanent injunction was sought to bar the taking of his deposition. The affidavit of Dr. Darnall supported the request for an injunction.

The injunction was denied and Dr. Keller appealed to the Seventh Circuit under 28 U.S.C. §1292(a)(1) and 28 U.S.C. §1291. The district court granted a stay of the deposition pending review by the Seventh Circuit, stating:

> I am going to grant the stay to permit the Court of Appeals to look at this issue, because if they view the marginal utility of this deposition in a different way from the manner in which I view it, that is what they are there for.

Transcript p. 4.

On appeal, the Seventh Circuit ordered the parties to submit memoranda on jurisdiction, addressing the question of whether "the district court order is really tantamount to an injunction which is appealable as of right." The Seventh Circuit, on December 9, 1982, held that "the order of the district court appealed from in this case is only a discovery order and not a final appealable order." Accordingly, that Court concluded that it was without jurisdiction to hear the matter.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court below that it had no jurisdiction to entertain the appeal of a non-party in a discovery matter which could cause irrevocable damage to that non-party and which would not be rectified on appeal at the end of the underlying litigation, conflicts directly with the Tenth Circuit's decision in *Covey Oil Company v. Continental Oil Company*, 340 F.2d 993 (10th Cir. 1965), *cert. denied*, 380 U.S. 964, 85 S.Ct. 1110, 14 L.Ed.2d 155, and its progeny. Further, it intensifies the conflict between circuits concerning the jurisdiction of the Circuit Courts to review discovery rulings made by the district courts which finally, irrevocably and irreparably affect the rights of non-parties. In *Covey Oil*, the Tenth Circuit considered the question of the appealability of a district court's denial of a motion to quash subpoenaes issued to non-party witnesses. Appeal was sought under 28 U.S.C. §1291, which states, in relevant part, that courts of appeals have jurisdiction "of appeals from all final decisions of the district courts of the United States."[2] Appellants, recognizing that generally such orders are not appealable because they are interlocutory to the main litigation, argued nevertheless that that rule should not apply to non-parties "who will suffer irreparable harm from the enforced disclosures and who have no recourse other than appeal from the order itself". 340 F.2d at 995. Appellants claimed that the denial of the motion to quash would cause irreparable harm to them because it would

[2] Unlike here, no effort was made in *Covey Oil* to also sustain jurisdiction under U.S.C. §1292(a)(1). 340 F.2d at 995 fn.3.

force them to reveal business trade secrets which could in turn destroy their business.

Respondents claimed that appellants could obtain automatic review by refusing to comply with the order and appeal from a subsequent adjudication of contempt. The Tenth Circuit, stating that it was "not impressed" with this legally precarious gauntlet, held that "non-party witnesses should not be required to expose themselves to the hazard of punishment in order to obtain a determination of their claimed rights." 340 F.2d at 996-997.

The Tenth Circuit, guided by this Court's instructions in *DiBella v. United States*, 369 U.S. 121 (1962), that the concept of finality must not be used to frustrate appellate review of an order collateral to the principal litigation "when the practical effect of the order will be irreparable to any subsequent appeal", 369 U.S. at 126, found the order to be appealable:

> What we have said does not mean that every order on a motion to quash a subpoena is appealable. Here we have a serious claim by non-party witnesses of a right to protection from the disclosure of trade secrets. Their claims are, in the language of *Swift & Co. Packers v. Compania Colombiani Del Caribe*, 339 U.S. 684, 689, 70 S.Ct. 861, 865, "fairly severable from the context of a larger litigious process." The practical effect of the order will be irreparable by any subsequent appeal. In our opinion the order is appealable.

340 F.2d at 997.

The Tenth Circuit followed its *Covey Oil* holding in *Saunders v. Great Western Sugar Company*, 396 F.2d 794 (10th Cir. 1968). The Fourth Circuit, in *North Carolina Association of Black Lawyers v. North Carolina Board of Law Examiners*, 538 F.2d 547 (4th Cir. 1976), cited the

Covey Oil decision with approval. In that case, the Fourth Circuit held that the refusal to issue a protective order against document discovery directed at a non-party law school was not appealable under 28 U.S.C. §§1291 or 1292, because it presented an intermediate procedural question—not a collateral one, resolvable without any reference to the substance of the action. 538 F.2d at 549.

In reaching the decision, the Fourth Circuit, however, was careful to distinguish *Covey Oil* on the ground that the *Covey Oil* appeal was properly taken because the ordered discovery there could provide a result which "would have been fatal to the interests of the discovered witnesses, non-parties to the litigation and without other safeguard". 538 F.2d at 549. As the Court observed:

> Appellant's distress is not unappreciated. Not a party to the action, it is unable to make its present point even after the final order in the case.

538 F.2d at 549.

In this case, the Seventh Circuit improperly applied a mechanical rule that all orders considered to be of a discovery nature are simply not appealable, regardless of the non-party status of the appellant, the finality of the order, the irreparable nature of the result, and the form of the requested order at the district court level. Such a mechanistic approach is directly in conflict with the rule of *Covey Oil* and this Court's directive in *DiBella*. If the deposition were to proceed and the warnings of Petitioner's doctor be proven accurate, the injury to the non-party could be irrevocable, and, perhaps, fatal. As in *Covey Oil*, Petitioner in this case will have no meaningful redress at the close of litigation. Any damage to Petitioner's health resulting from deposition cannot be rectified on a later appeal just as the damage sustained

by the businesses of the nonparties in *Covey Oil* could not have been alleviated by an appeal at the end of litigation.

The conflict between the Tenth, Fourth and Seventh Circuits is exacerbated by the Second Circuit's decision in *United States v. Fried*, 386 F.2d 691 (2nd Cir. 1967), where that Court, in denying jurisdiction over an appeal from the denial of a motion to quash a deposition subpoena on health grounds, held that the witness actually had to subject himself to a contempt proceeding to seek appellate review:

> If Fried is not exaggerating, *as the district judge thought he was*, he will continue his refusal and a more meaningful review can be had on the fuller record that will become available in the contempt proceeding. (emphasis added)

386 F.2d at 695.

The *Fried* case, while expressly rejecting the *Covey Oil* standard, is factually distinguishable from this case. In *Fried*, the Court clearly had reservations about the sincerity of Appellant's motives, the son of the defendant tax evader, the continued frustration of the government in attempting to collect long overdue taxes, and the danger to the prospective witness, which the district court thought was "exaggerated."

Clearly, the ability of a non-party to obtain appellate review of such an order as was entered here does, but should not, depend on the circuit wherein review is requested.

II.

The decision of the Court below conflicts with the express statutory language of 28 U.S.C. §1292(a)(1). That statute states, in relevant part:

> "(a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States . . . refusing injunctions."

Here, the district court was asked to forever enjoin the deposition of Petitioner, a man over 91 years old and in ill health. The permanent injunction was sought because his physician rendered a medical opinion that any deposition or fear of deposition, could permanently, seriously and irrevocably injure him.

The literal wording of the statute mandates that an order refusing an injunction be appealable as of right regardless of the posture of the other issues to be tried. As Senior Judge Swygert noted in *American Cyanamid Co. v. Lincoln Laboratories, Inc.*, 403 F.2d 486, 488 (7th Cir. 1968):

> Subsection 1292(a)(1) states that an interlocutory appeal may be taken from any district court order "granting, continuing, modifying, refusing or dissolving" an injunction. There is no language in this injunction subsection requiring finality of judgment.
>
> In fact, the term judgment does not appear in that subsection. The literal wording of the injunction provision leads us to believe that the other courts dealing with appeals relating to orders granting or denying an injunction have been correct in holding that such an order may be appealed under Section 1292(a)(1) regardless of the other issues to be tried in a case, that is, regardless of whether every issue has been finally adjudicated.

See also, Clean Air Coordinating Committee v. Roth-Adam Fuel Co., 465 F.2d 323 (7th Cir. 1972) (stay of proceedings wherein plaintiff sought a preliminary injunction constituted a refusal of injunction and the stay order was appealable); *Allico National Corporation v.*

Amalgamated Meat Cutters & Butcher Workmen of North America, 397 F.2d 727, 729 (7th Cir. 1968).

The motion for the issuance of a permanent injunction to prohibit the deposition constituted a separate and distinct action on behalf of a non-party. The issuance of the injunction was the substantive relief sought and the denial of an injunction disposed of all substantive relief sought. The refusal of an injunction, which is the only relief sought by the Petitioner, is precisely the type of situation governed by §1292. That section was enacted to allow appeal as of right from such an order. Counsel for Petitioner chose to appeal the denial of the injunction rather than instruct him not to testify and invoke a contempt citation because that fear, in and of itself, could have been dangerous to Petitioner's health. Yet if a contempt citation had been entered against the Petitioner, even the Second Circuit recognizes an appeal as of right. *United States v. Fried*, 386 F.2d 691 (2nd Cir. 1967). Clearly, appealability should not be predicated upon such formalistic distinctions.

III.

The decision below and the conflicts both among and within the Circuits warrant the exercise of this Court's supervisory power. In addition, the decision below raises important and fundamental questions concerning the access to appropriate legal redress for the non-litigant. Indeed this Court's silence in setting forth the appropriate safeguards for aggrieved non-litigants, brought into civil lawsuits at potentially great physical danger, is a matter which ought to be addressed.

Courts are understandably reluctant to allow parties to seek piecemeal, appellate review when judicial efficiency dictates a singular review 'en masse' of all claimed

trial court errors. In the case of the non-party, however, the situation is entirely different. While the issue may be a discovery matter to the combatants, it can be a final, serious and irreparably harmful matter to the non-party. The concept of appealing when the underlying lawsuit is final is meaningless to the non-party. If the decision of the trial judge is in error, the damage has been done. To suggest that a non-litigant subject to great health hazard be forced to be held in contempt to obtain appellate review, as *Fried* seems to suggest, is an affront to all concepts of fundamental fairness and logic.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 9, 1982.

Before
Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

IN RE:
JOHNS-MANVILLE ASBESTOS CASES.

No. 82-2357 vs.

APPEAL OF:
DR. SAMUEL S. KELLER.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 C 3534—**Milton I. Shadur**, *Judge.*

This matter comes before the Court for its consideration upon the following documents:

1. The "PLAINTIFF'S MEMORANDUM ON JURISDICTION" filed herein on September 14, 1982,
2. The "MEMORANDUM IN SUPPORT OF THE JURISDICTIONAL BASIS FOR THE APPEAL OF DR. SAMUEL S. KELLER, filed herein on September 14, 1982,

3. The "SUGGESTION OF STAY" filed herein on September 14, 1982, by counsel for the defendant,
4. The "STATEMENT OF APPELLANT, DR. SAMUEL S. KELLER" filed herein on October 12, 1982.

The order of the district court appealed from in this case is only a discovery order and not a final appealable order. This Court is without jurisdiction to hear this matter.

DISMISSED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Shadur

Cause No. 77 C 3534 Date Aug. 3, 1982

Title of Cause John D. McDaniel, et al. vs. Johns-Manville Sales Corp. et al.

Brief Statement of Motion Motion to Enjoin The Taking of The Oral Deposition of Dr. Samuel S. Keller.

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel McConnell, Ruberry & Jansen, 135 S. LaSalle St., Ste. 4310, Chicago, Ill. 60603

Representing Dr. Samuel S. Keller

Names and Addresses of other counsel entitled to notice and names of parties they represent. John C. Bulgar, Cooney & Stern, 77 W. Washington St., Ste. 1632, Chicago, Ill. 60602

Reserve space below for notations by minute clerk

Motion of Samuel S. Keller to enjoin the taking of his oral deposition is denied.

Hand this memorandum to the Clerk.

Counsel will not rise to address the Court until motion has been called.

No. 82-1523

In the

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OCTOBER TERM, 1982

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APPEAL OF: DR. SAMUEL S. KELLER

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On Petition for Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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Respondents.

On Petition for Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The underlying case was brought in the United States District Court for the Northern District of Illinois on behalf of the respondents who are former employees and widows of former employees of the Johns-Manville Corporation plant in Waukegan, Illinois for injuries and deaths which occurred as a result of exposure to asbestos at the plant. The Petitioner was a plant physician at the Waukegan plant from 1923 until 1954, during which time he performed physical examinations and caused chest x-rays to be taken of respondents and respondents' decedents.

In February of 1982, attorneys for respondents learned of Petitioner's whereabouts, contacted him, and obtained a court-reported statement from him at his home. Respondents subsequently noticed his deposition for April 1, 1982. Before the deposition was to go ahead, counsel who had since been retained to represent Petitioner obtained permission from the district court to continue the deposition, so that he would have an opportunity to become familiar with the litigation.

On August 3, 1982, six (6) days before the deposition was to go ahead for a second time, Petitioner, through his attorney, presented to the district court his Motion to Enjoin the Taking of the Oral Deposition of Dr. Samuel S. Keller on the grounds that the deposition would subject Petitioner to potential health hazards. The district court denied his motion.

Petitioner then appealed to the Court of Appeals for the Seventh Circuit under 28 U.S.C. §1292 (a)(1) and 28 U.S.C. §1291. The Seventh Circuit ordered the parties to submit memoranda on jurisdiction, specifically address-

ing the question of whether "the district court order is really tantamount to an injunction which is appealable as of right." On December 9, 1982, the Seventh Circuit held that the order of the district court appealed from was a discovery order. The court then dismissed the appeal, concluding that they were without jurisdiction to hear it.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied, because the decision of the Court below denying appealability follows the applicable decisions of this Court and is not in conflict with decisions of other courts of appeals.

ARGUMENT

I.

Petitioner would have this Court believe that conflict on the question of the jurisdiction of the Court of Appeals to entertain the appeal of a non-party from an order directing the non-party to submit to a deposition now exists between the Tenth, Seventh, Fourth and Second Circuits. A survey of the case law shows that no such conflict exists.

Petitioner cites the decision by the Court below as being in direct conflict with the Tenth Circuit's decision in *Covey Oil Company* v. *Continental Oil Company*, 340 F.2d 993 (10th Cir. 1965), *cert. denied*, 380 U.S. 964, 85 S.Ct. 1110, 14 L.E.2d 155 (1965). The Court in *Covey Oil* did hold that a trial court's denial of a motion to quash subpoenaes issued to non-party witnesses was appealable under 28 U.S.C. §1291. However, the viability of the *Covey Oil* case has been questioned.

In *United States* v. *Ryan*, 402 U.S. 530 (1971), this Court upheld the long standing rule that one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena, but must refuse to comply and subject oneself to being cited for contempt in order to obtain a right to review. *Cobbledick* v. *United States*, 309 U.S. 323 (1940); *Alexander* v. *United States*, 201 U.S. 117 (1906).

> [W]e have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the produc-

> tion of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal.

United States v. *Ryan, supra,* at 532-533.

Petitioner cites this Court's decision in *DiBella* v. *United States,* 369 U.S. 121 (1962), as support for the *Covey Oil* case. In *DiBella* v. *United States, supra,* this Court held that immediate review was available from a denial of a pretrial motion for the return of seized property. However, in *United States* v. *Ryan,* 402 U.S. 530 (1971), this Court distinguished its decision in *DiBella* from cases like *Covey Oil* and the instant case. This Court noted that the *DiBella* case was one of a limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claim. In the instant case, as in *Covey Oil,* immediate review is available from a contempt proceeding.

The Tenth Circuit has subsequently questioned its own decision in the *Covey Oil* case. In *United States* v. *Feeney,* 641 F.2d 821 (1981), a non-party's motion to quash a subpoena duces tecum was denied and appealed. The appellant argued that the *Covey Oil* decision applied. The Tenth Circuit noted that the *Covey Oil* rule had been criticised. The Court went on to note that this Court had consistently held that an order denying a motion to quash a subpoena is not final and that the subpoenaed party is to make the choice between compliance and resistance with the possibility of contempt, citing *United States* v. *Ryan,* 402 U.S. 530 (1971). The Court then held that the denial of the motion to quash the subpoena was not reviewable.

The Seventh, Fourth and Second Circuits have all followed this Court's decision in *United States* v. *Ryan,* 402 U.S. 530 (1971), and its predecessors. The ruling of the Court below is in line with previous decisions in the Seventh Circuit. In *Ryan* v. *C.I.R.,* 517 F.2d 13, (7th Cir. 1975), *cert. denied,* 423 U.S. 892, 96 S.Ct. 190, 46 L.ED.2d 124 (1975), the Court upheld the rule that a non-party wishing to appeal an order compelling testimony must refuse to answer and subject himself to contempt, citing *Alexander* v. *United States,* 201 U.S. 117 (1906).

Although Petitioner states that the Fourth Circuit decision in *North Carolina Association of Black Lawyers* v. *North Carolina Board of Law Examiners,* 538 F.2d 547 (4th Cir. 1976) cited the *Covey Oil* decision with approval, that Court in fact came up with an opposite result. In that case non-party movants were refused a protective order forbidding certain discovery. Although the appellants cited to the *Covey Oil* decision, the Court stated that *United States* v. *Ryan,* 402 U.S. 530 (1971), was the foremost precedent on point. The Court then went on to hold that the order was not appealable under either 28 U.S.C. §1291 or 28 U.S.C. 1292, and that the appellant must either comply or suffer contempt sanctions.

The Second Circuit has on several occassions expressly rejected the *Covey Oil* decision in favor of this Court's long standing review-through-contempt rule. *United States* v. *Fried,* 386 F.2d 691 (2nd Cir. 1967); *Kaufman* v. *Edelstein,* 539 F.2d 811 (2nd Cir. 1976). The Petitioner attempts to distinguish the *Fried* case from the instant case on the basis that the Court had reservations about the sincerity of that particular appellant's motives. How-

ever, the language in the opinion reveals that the Court in *Fried* was not questioning that individual's motives in particular, but was following the historic rule that a witness' sincerity should be put to test before allowing him an opportunity for review.

> With the number of appeals having increased almost 70% in the last five years, ..., as against the much smaller growth in district court litigation, this is no time to weaken the historic rule putting a witness' sincerity to test of having to risk a contempt citation as a condition to appeal, however harsh its application may seem to appellant here.

United States v. *Fried, supra,* at 645.

Four other circuits have also expressly rejected the *Covey Oil* decision and have followed this Court's review-through- contempt doctrine of *Alexander* and its progeny. *In Re Benjamin,* 582 F.2d 121 (1st Cir. 1978); *Borden Co.* v. *Sylk,* 410 F.2d 843 (3rd Cir. 1969); *Gialde* v. *Time, Inc.,* 480 F.2d 1295 (8th Cir. 1973); *United States* v. *Anderson,* 464 F.2d 1390 (D.C. Cir. 1972).

The decision of the Court below regarding appealability under 28 U.S.C. §1291 is not in conflict with the decisions of other courts of appeals and it does not conflict with the applicable decisions of this Court. The decision in the instant case follows the great weight of authority. The only decision cited by Petitioner which is actually in conflict with the decision in the instant case is of questionable vitality. Therefore, review by this Court is not necessary.

II.

Petitioner's argument that the decision of the Court of Appeals in the instant case is in conflict with the statu-

tory language of 28 U.S.C. §1292 (a)(1) must be premised on an assumption that the district court's order denying the motion to enjoin the taking of Petitioner's deposition is tantamount to a refusal of an injunction. Petitioner's bold assumption ignores the fact that the precise question before the Court below was whether the order did constitute a refusal of an injunction. Furthermore, the case law interpreting the language of 28 U.S.C. §1292 (a)(1) makes it clear that the order entered by the district court in the instant case was merely an order regulating the conduct of discovery and was not an order refusing an injunction within the meaning of the statute.

Petitioner describes his motion to enjoin the taking of his deposition as a request for a permanent injunction. However, orders concerning the conduct of the litigation unrelated to the substantive issues in the action are not injunctions within the meaning of 28 U.S.C. §1292 (a)(1). *International Products Corp.* v. *Koons*, 325 F.2d 403, 406 (2nd Cir. 1963); *Rodgers* v. *United States Steel Corp.*, 541 F.2d 365, (3rd Cir. 1976).

The Court in *International Products Corp.* v. *Koons, supra*, dismissed an appeal from an order that sealed depositions and enjoined the defendants, the attorneys, and others from disclosing any of the testimony in the deposition. Following their prior decisions and previous decisions of this Court, the Second Circuit held that 28 U.S.C. §1292 (a)(1) was to be read as relating to injunctions which give or aid in giving some or all of the substantive relief sought by the complaint, and not as including restraints or directions in orders concerning the conduct of the parties or their counsel before trial, unrelated to the substantive issues in the case.

> As explained in *Baltimore Contractors, Inc.* v. *Bodinger, supra,* 348 U.S. at 181, 75 S.Ct. at 252 and *Grant* v. *United States, supra,* 282, F.2d at 169, such a constriction provides a better fit with the language of the statute, 'Where, upon a hearing in equity in a district court' as this first appeared in §7 of the Evarts Act, C. 517, 26 Stat, 828 (1891) and later in the Judicial Code of 1911, §129, 36 Stat. 1134, with the conclusion that the omission of the words 'in equity' in the Act of February 13, 1925, 43 Stat. 937 'was not intended to remove that limitation,' *Schoenamsgruber* v. *Hamburg American Line,* 294 U.S. 454, 457, fn.3; 55 S.Ct. 475, 477, 79 L.Ed. 989 (1935); and with the policy considerations which led Congress to create this exception to the federal final judgment rule.

Id. at 406-407.

In *Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc.,* 385 U.S. 23, 25 (1966), this Court reaffirmed that orders that do not touch on the merits of the claim, but only relate to pretrial procedures are not "interlocutory" within the meaning of 28 U.S.C. §1292 (a)(1), expressing concern for protecting the integrity of the Congressional policy against piecemeal appeals. In *Gardner* v. *Westinghouse Broadcasting Co.,* 437 U.S. 478 (1978), this Court cited the earlier decision in *Switzerland* with approval. In dismissing an appeal from a denial of class certification, this Court held that the statute created a narrow exception from the established policy against piecemeal appeals and that the exception did not embrace orders that have no direct or irreparable impact on the merits of the controversy. *Id.* at 480, 482.

The order in the instant case refusing Petitioner's motion to enjoin the taking of his deposition did not refuse ultimate injunctive relief sought by the claimants. The

order was totally unrelated to the substantive issues in the action and merely regulated the conduct of discovery. The Courts have held that an order directing the parties to proceed with due diligence to the taking of depositions is not appealable, (*Manuel San Juan Co.* v. *American International Underwriters Corp.*, 331 F.Supp. 1050 (1971), *aff'd on other grounds*, 494 F.2d 317 (1974)), and that an order quashing the taking of a deposition does not constitute an interlocutory injunction within the meaning of 28 U.S.C. §1292 (a)(1), (*Time, Inc.* v. *Ragano*, 427 F.2d 219 (5th Cir. 1970)).

The cases cited by Petitioner do not lend support to his position that the district court order was an order refusing an injunction. In *Allico National Corporation* v. *Amalgamated Meat Cutters & Butcher Workmen of North America*, 397 F.2d 727 (7th Cir. 1968) and *Clean Air Coordinating Committee* v. *Roth-Adam Fuel Co.*, 465 F.2d 323 (7th Cir. 1972), the Courts found that the orders appealed from were in effect refusals for preliminary injunctions, and were thus appealable under 28 U.S.C. §1292 (a)(2). However, in both of those cases an injunction was the substantive relief sought by the claimants, so the orders refusing the injunctive relief did relate to the merits of the plaintiffs' claims and did not merely relate to the taking of a step in the litigation. In *American Cyanamid Co.* v. *Lincoln Laboratories, Inc.*, 403 F.2d 486 (7th Cir. 1968) the issue was whether there was jurisdiction under 28 U.S.C. §1292 (a)(4). The Court did discuss 28 U.S.C. §1292 (a)(1), but their focus was on the lack of a finality requirement which is not the issue here.

The decision of the Court of Appeals in the instant case regarding appealability under 28 U.S.C. §1292 (a)

(2) follows the applicable decisions of this Court and the decisions of the other Circuits. Therefore, review by this Court is unnecessary.

CONCLUSION

There is no valid reason why this Court should review the decision of the Court below, since the decision follows the applicable decisions of this Court and is in line with decisions in the other Circuits on appealability under 28 U.S.C. §1291 and 28 U.S.C. §1292(a)(1). The order of the district court in the instant case is not appealable under 28 U.S.C. §1291, since it is merely a discovery order which lacks the requisite finality. Neither is it appealable under 28 U.S.C. §1292(a)(1), since the order does not fall into the narrow exception of subsection (1) allowing appeals from interlocutory orders of district courts refusing injunctions. The order was not tantamount to a refusal of an injunction, since it merely regulated the conduct of discovery and did not relate to the substantive issues in the case.

The Petitioner has not been denied access to review of the order of the district court. The cases are clear that he may obtain review from a contempt citation if he chooses to refuse to testify. This Court is aware of the problems facing a non-party desiring review of such an order. However, in order to protect the established policy against piecemeal appellate review which interrupts the litigation process, this Court has decided and continues to hold that a non-party may only obtain review from an order such as was entered by the district court in the instant case through review from a contempt citation.

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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